Jong Chuk v Chong Tung Sang & Ors

HIGH COURT (KUCHING) — SUIT NO KG 104 OF 1994(II)
MUHAMMAD KAMIL J
8 APRIL 1999

Civil Procedure *— Stay of proceedings — When will a stay be granted — No reason given in application — Allegation that stay would result in substantial wastage of judicial time — Application to be made promptly — Failure to state basis for application — Whether application was made to delay proceedings*

The sixth defendant/third party's ('the sixth defendant') applied for stay of all proceedings in respect of the action until the final disposal of several appeals to the Court of Appeal. The plaintiff and first to fifth defendants opposed the application and prayed that it be dismissed with costs.

Held, dismissing the application with costs:

(1) The sixth defendant did not give any ground for its application or show any special circumstances to invoke the discretion of the court to grant the stay. A stay in this case would only cause further delay. The allegation that a decision in favour of the sixth defendant in the appeals may result in substantial wastage of judicial time was also baseless and speculative (see p 162B–I).

(2) The applicant had failed to state whether it was applying under a particular statutory provision, or under the Rules of the High Court, or under the court's inherent jurisdiction, or under one or all of these powers. This failure makes the application liable to be struck off. Furthermore, an appeal does not operate as a stay of execution or of proceedings unless the court so orders (see p 163E–G).

(3) The application for a stay should be made promptly, as soon as practicable, after the grounds for making it have arisen or come to the knowledge of the applicant, otherwise it may be refused. In this case, the application for stay was made only after the plaintiff and first to fifth defendants had submitted their written submissions. The motive of the sixth defendant was apparent; it was to delay the proceedings. This amounts to an abuse of the process of the court (see p 164A–C).

[Bahasa Malaysia summary

Defendan keenam/pihak ketiga ('defendan keenam') telah memohon untuk penggantungan semua prosiding-prosiding berkenaan dengan tindakan tersebut sehingga penyelesaian muktamad beberapa rayuan-rayuan kepada Mahkamah Rayuan. Plaintif dan defendan-defendan pertama hingga kelima menentang permohonan tersebut dan memohon agar ia ditolak dengan kos.

Diputuskan, menolak permohonan dengan kos:

(1) Defendan keenam tidak memberikan apa-apa alasan untuk permohonannya atau menunjukkan apa-apa keadaan-keadaan khas untuk menggunakan budi bicara mahkamah untuk membenarkan penggantungan. Suatu penggantungan di dalam kes ini hanya akan menyebabkan kelewatan selanjutnya. Pengataan bahawa suatu keputusan yang menyokong defendan keenam di dalam rayuan-rayuan boleh menyebabkan pembaziran banyak masa kehakiman adalah juga tidak berasas dan spekulatif (lihat ms 162B–I).

(2) Pemohon telah gagal untuk menyatakan sama ada ia memohon di bawah peruntukan statutori tertentu, atau di bawah Kaedah-Kaedah Mahkamah Tinggi, atau di bawah kuasa sedia ada mahkamah, atau di bawah satu atau semua kuasa-kuasa ini. Kegagalan ini membuatkan permohonan tersebut boleh dibatalkan. Tambahan lagi, suatu rayuan tidak beroperasi sebagai penggantungan pelaksanaan atau prosiding-prosiding kecuali jikalau mahkamah memerintahkan sedemikian (lihat ms 163E–G).

(3) Permohonan untuk suatu penggantungan seharusnya dibuat dengan segera, sebaik sahaja boleh dilaksanakan, setelah alasan-alasan untuk berbuat demikian telah timbul atau sampai kepada pengetahuan pemohon tersebut, jika tidak ia boleh ditolak. Di dalam kes ini, permohonan untuk penggantungan telah dibuat hanya setelah plaintif dan defendan-defendan pertama hingga kelima telah menyerahkan hujahan-hujahan bertulis mereka. Motif defendan keenam adalah ketara; ia adalah untuk melengahkan prosiding-prosiding. Ini terjumlah kepada suatu penyalahgunaan proses mahkamah (lihat ms 164 A–C).]

Notes

For cases on stay of proceedings, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4272–4332.

Cases referred to

Kerajaan Malaysia v Dato' Hj Ghani Gilong [1995] 2 MLJ 119 (refd)
Kerajaan Malaysia v Jasanusa Sdn Bhd [1995] 2 MLJ 105 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 73
Rules of the Court of Appeal 1994 r 13
Rules of the High Court 1980 O 47 r 1

Wong Kim Fatt (*Albert Tang* with him) (*Chew, Jugah, Wan Ullok & Co*) for the plaintiff.

Fabian Lim (*Lim & Lim*) for the first to fifth defendants. A

DP Naban (*Malaka Nisau* with him) (*Sulong Matjeraie & Co*) for the sixth defendant/third party.

Muhammad Kamil J: This is the sixth defendant/third party's ('6D/TP') application for stay of all proceedings in respect of the action until the final disposal of the three appeals to the Court of Appeal in this action. B

The plaintiff and first to fifth defendants opposed this application and prayed that it be dismissed with costs.

In the 6D/TP's summons in chambers dated 24 December 1998 (encl 327) no ground for its application for stay was stated. The affidavit of David Goh of the same date in support of this application has not shown C any special circumstances to invoke the discretion of the court to grant the stay sought. The court has not given any decision on the action proper and no execution of any order is pending. As such, any allegation that the continuation of the proceedings pending the final disposal of the appeal may prove nugatory is irrelevant and highly speculative.

D

It may be noted that this power to grant a stay is discretionary and as such the applicant must provide adequate materials before the court for it to exercise its discretion.

In para 4 of David Goh's affidavit, he alleged that:

> Continuing with the proceedings presently before the disposal of the three E appeals would prejudice Bacom's case irreparably particularly in view of the submissions made by the plaintiff which are contrary to the arguments and submissions raised during the hearing of the notice of motion dated 4 August 1997.

In para 5:

F

> Further, in the event the proceedings are continued pending the disposal of the appeals referred to above, a decision in favour of Bacom in the appeals may result in substantial wastage of judicial time, cost and or may even prove nugatory.

On the issue of 'irreparable prejudice', David Goh has not shown how there G would be irreparable prejudice or the basis to say that it is a ground for stay of proceedings.

David Goh's allegation that continuing the proceedings 'may' prove nugatory is irrelevant. A final decision on the merits of the civil suit proper has not been made, and there is also no pending execution of a final order as at the date hereof. It is purely speculative to say whether the three appeals H would render the 6D/TP's case nugatory.

The trial has taken more than two years. The parties have closed their cases and filed their respective written submissions. Further delay would be caused by a stay of proceedings, and more importantly, it is not justifiable. David Goh's allegation that 'a decision in favour of Bacom in the appeals I may result in substantial wastage of judicial time, cost and or may even prove nugatory' is baseless and speculative.

A There is nothing in David Goh's affidavit to show special circumstances which are normally required to be shown when applying for a stay of execution of an order. See *Kerajaan Malaysia v Dato' Hj Ghani Gilong* [1995] 2 MLJ 119 (FC) and *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105 (FC).

B *Halsbury's Laws of England* (4th Ed) Vol 37 para 437 provides:

> A stay of proceedings arises under an order of the court which puts a stop or 'stay' on the further conduct of the proceedings in that court at the stage which they have then reached, so that the parties are precluded thereafter from taking any further step in the proceedings. The object of the order is to avoid the trial or hearing of the action taking place where the court thinks it is just
> C and convenient to make the order, to prevent undue prejudice being occasioned to the opposite party or to prevent the abuse of process. The order is made generally in the exercise of the court's discretionary jurisdiction, and by way of summary process, that is without a trial on the substantive merits of the case, and, at any rate in the exercise of its inherent jurisdiction, an order for the stay of proceedings is made very sparingly and only in exceptional
> D circumstances.

Further, para 439:

> ... In all cases, the grounds on which the application is made must be clearly specified, stating whether it is made under a particular statute or rule of court or the court's inherent jurisdiction or a combination of these. ...

E The court's power to stay proceedings may be exercised under particular statutory provisions, or under the Rules of the High Court, or under the court's inherent jurisdiction or under one or all of three powers. The applicant had failed to state whether it was applying under a particular statutory provision, or under the Rules of the High Court, or under the
F court's inherent jurisdiction, or under one or all of these powers. This failure makes the application liable to be struck off. Order 47 r 1 of the Rules of the High Court 1980 is obviously not applicable to the case.

Section 73 of the Courts of Judicature Act 1964 provides:

> An appeal shall not operate as a stay of execution or of proceedings under the
> G decision appealed from unless the court below or the Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.

Rule 13 of the Rules of the Court of Appeal 1994 provides:

> An appeal shall not operate as a stay of execution or of proceedings under the
> H decision appealed from unless the High Court or the court so orders and no intermediate act or proceeding shall be invalidated except so far as the court may direct.

The court's inherent power to order a stay of proceedings is succinctly summarised in para 442, *Halsbury's Laws of England*:

I > ... The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice

is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.

The application for stay not bona fide

The application for a stay should be made promptly, as soon as practicable after the grounds for making it have arisen or come to the knowledge of the applicant, otherwise it may be refused.

After the close of the case for the 6D/TP, the court directed the parties to submit written submissions within a certain time frame. The parties agreed, and there was no indication that the 6D/TP would make an application for a stay of proceedings pending the disposal of the three appeals. Only after the plaintiff and first to fifth defendants had submitted their written submissions did the 6D/TP make an application on 24 December 1998 for a stay of proceedings. The motive of the 6D/TP is apparent. It is to delay the proceedings. It is an abuse of the process of the court.

In the circumstances, I would dismiss the application with costs to be taxed unless agreed and paid forthwith by the 6D/TP.

Application dismissed with costs.

Reported by Loo Lai Mee